Supreme Court, U.S.
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No. 93-1269

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

YOUNG IN HONG,

*Petitioner,*

v.

CHILDREN'S MEMORIAL HOSPITAL,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION RESTATED

Whether the Seventh Circuit's statement of the elements of a prima facie case of disparate treatment discrimination conflicts with applicable decisions of this Court or other courts of appeals.

## STATEMENT REQUIRED BY RULE 29.1

Children's Memorial Medical Center, an Illinois not-for-profit-corporation, is the parent company of Children's Memorial Hospital, also an Illinois not-for-profit-corporation. Children's Memorial Hospital has no non-wholly-owned subsidiaries or affiliates.

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In this case, the Court of Appeals stated and applied the elements of a prima facie case of intentional discrimination. This Court established those elements in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and has repeatedly reaffirmed them. The Court of Appeals followed *McDonnell Douglas* and subsequent decisions of this Court in holding that Petitioner had failed to establish a prima facie case because she was not meeting her employer's legitimate job expectations at the time of her discharge. This holding, and the reasons for it, involve matters of well-settled law as applied to the particular facts of this case. The case presents no issue appropriate for review by this Court.

## COUNTERSTATEMENT OF THE CASE

In 1968, Children's Memorial Hospital hired Petitioner Young In Hong, an American citizen of Korean national origin, as a medical technologist in the hospital's Clinical Chemistry Laboratory. Hong worked there part-time until 1976, when she became a full-time medical technologist. From 1976 until her discharge in October 1987, Hong's immediate supervisor was Marina Barrientos. Barrientos conducted annual performance evaluations of Hong's work.

Prior to 1985, Hong's performance evaluations were generally favorable. In early 1986, however, the hospital undertook an internal evaluation of laboratory operations in order to upgrade laboratory equipment and performance. Consequently, the hospital installed new equipment, including a computerized quality control system for specimen testing.

In 1985, 1986 and 1987, Petitioner's annual performance evaluation scores dropped markedly. Among other things, Petitioner was cited for excessive absenteeism, failure to perform assigned tasks in a timely manner, failure to identify instrument malfunctions during testing procedures, failure to report test results to her supervisors, failure to maintain laboratory inventory, and failure to follow laboratory quality control and management procedures. By 1987, Petitioner received a performance evaluation score which fell below the hospital's standard of competency.

From February 1986 to July 1987, Petitioner was also issued seven formal written disciplinary notices for various performance deficiencies. Two of these reports resulted in two and three-month probationary periods. Another resulted in a two-day suspension.

On October 20, 1987, after Petitioner had received yet another disciplinary notice, Dr. Frederick Smith sent Peti-

tioner a memorandum terminating her employment with the Clinical Chemistry Laboratory.[1] The memo indicated that this action was based on Petitioner's unsatisfactory performance over the previous year and a half.

Petitioner then filed suit in federal district court claiming that she had been discharged based on her national origin in violation of Title VII of the Civil Rights Act of 1964. The hospital answered the complaint and moved for summary judgment on two grounds: (1) that Petitioner failed to establish a prima facie case of discriminatory discharge in that she failed to show that she was meeting her employer's legitimate expectations at the time of her discharge; and (2) assuming the existence of a prima facie case, Petitioner failed to produce sufficient evidence from which a jury could reasonably find that the hospital's stated reason for terminating her — unsatisfactory job performance — was a pretext for discrimination.

The district court granted the hospital's motion for summary judgment. The court held that Petitioner's case was "too thin to permit a trier of fact to return a verdict for Hong" because she had produced "insufficient evidence to refute the claims that her work was not meeting her employer's reasonable expectations of job performance at the time she was fired and a fortiori to show that the stated reason [for discharge] is a pretext" (App. 35, 34).[2] The district court also found that Petitioner had failed

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[1] As the Division Head of the hospital's Department of Clinical Pathology, Dr. Smith supervised the Clinical Chemistry Laboratory. He did not participate in annual evaluations of medical technologists.

[2] Petitioner failed to paginate either the petition or the appendix. Respondent has paginated them for her in accordance with Supreme Court Rule 33.3.

to show any similarly situated non-Koreans who were treated differently; the only non-Korean with a disciplinary record comparable to Petitioner's was likewise terminated.

The Court of Appeals for the Seventh Circuit affirmed. Using the analytic framework established by this Court, the Court of Appeals held that Petitioner had failed to establish a prima facie case because she failed to show that her performance on the job was adequate at the relevant time — when she was discharged (App. 12). The court considered each of Petitioner's arguments but was unpersuaded by her "bare assertion of disparate treatment" (App. 13).

Petitioner filed a petition for rehearing with the Seventh Circuit with request for rehearing in banc. That petition was denied.

## REASONS FOR DENYING THE WRIT

### The Writ Should Be Denied Because The Decision Below Comports With The Decisions Of This Court And Other Courts Of Appeals.

The petition does not merit this Court's attention. Petitioner asks this Court to identify the proper burden of proof to establish a prima facie case of disparate treatment discrimination under Title VII. The Court did so 21 years ago in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), a case which Petitioner fails even to cite.[3] Nor does Petitioner cite the numerous decisions

[3] There, the Court stated that a plaintiff alleging racial discrimination in hiring must show "(i) that he belongs to a racial minority; (ii) that he applied and *was qualified* for a job for which the em-

(Footnote continued on following page)

of this Court since *McDonnell Douglas* in which the Court reiterated and explained the elements of a prima facie case of intentional discrimination. *See, e.g., Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575-77 (1978); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981); *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2747 (1993).

The Seventh Circuit's decision in this case is wholly consistent with applicable decisions of this Court. The Court of Appeals held that Petitioner had failed to show that she was "qualified" for her position at the time she was discharged. The court first stated that Petitioner must show that "she was doing her work well enough to meet her employer's legitimate expectations" (App. 11). The court then held that Petitioner had failed to meet this burden and, therefore, could not make out a prima facie case of discrimination. Nowhere does Petitioner contend that the Seventh Circuit's analysis misconstrues the "qualifications" element (or any other element) under *McDonnell Douglas*.[4]

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[3] *continued*
ployer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas*, 411 U.S. at 802 (emphasis added).

[4] Any such argument would be meritless. No plaintiff could tenably contend that she was "qualified" for the position at issue notwithstanding that she failed "to meet her employer's legitimate expectations." Moreover, the Court has long recognized that "the specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to different factual situations." *McDonnell Douglas*, 411 U.S. at 802 n.13. *See also Furnco*, 438 U.S. at 575 ("The method suggested in *McDonnell Douglas* . . . was never intended to be rigid, mechanized or ritualistic"). Thus, whether the Seventh Circuit used the exact words of *McDonnell Douglas* is of no consequence as long as it generally followed the *McDonnell Douglas* approach.

Instead, Petitioner attempts to glean a "split among the various Circuit[s]" (Pet. 3-4) from the phraseology which courts have used in restating or applying the qualifications element under *McDonnell Douglas*. There is no split; any differences in phraseology are semantic at most. Indeed, virtually all of the passages cited by Petitioner are rooted in uncontroversial facets of *McDonnell Douglas* or subsequent decisions of this Court.[5] In sum, none of the cases or passages cited by Petitioner reflect a material divergence of views among the courts of appeals as to the elements for proving a prima facie case.

The remainder of the petition consists of arguments that the Court of Appeals misapplied the law by excluding some of Petitioner's evidence and discounting her other evidence (Pet. 10-11). These arguments boil down to a request that the Court reevaluate the record. Petitioner advances no special or important reasons why these arguments warrant a writ of certiorari. None of Petitioner's arguments raise a new or important federal question. None of them raise a conflict between the Court of Appeals'

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[5] For example, Petitioner at one point notes that the Third Circuit "made it clear . . . that this [prima facie standard] is an easy standard to meet." (Pet. 4, citing *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 523 (3d Cir. 1992)). But that is nothing new; this Court recognized as much in *Burdine*, 450 U.S. at 253 ("The burden of establishing a prima facie case of disparate treatment is not onerous."). At another point, Petitioner suggests that the Fourth Circuit was somehow out of line in stating that a plaintiff must "prove a prima facie case by eliminating the most common non-discriminatory reason" for his rejection (Pet 4., citing *Wileman v. Frank*, 979 F.2d 30, 33 (4th Cir. 1992)). In *Wileman*, however, the court was simply restating the long-established proposition that proof of a prima facie case serves the litigation-focusing function of eliminating the most common non-discriminatory reasons for the plaintiff's rejection. *See Burdine*, 450 U.S. at 253-54. *See also Furnco*, 438 U.S. at 577.

ruling in this case and applicable decisions of this Court. And none of them evince a conflict within the circuits over important evidentiary or other issues. Rather, Petitioner reargues the merits of her case as if she had an appeal to this Court as a matter of right. That is plainly not correct.[6]

This Court has been faced with some vexing issues in the employment discrimination field; Petitioner does not present such an issue. As this Court has explained, disparate treatment is "the most easily understood type of discrimination." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). And within the confines of disparate treatment analysis, proving the elements of a prima facie case is the most straightforward and rudimentary of tasks. That Petitioner could not do so in this case means only that the case was "too thin to permit a trier of fact to return a verdict for Hong" (App. 35).

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[6] In any event, the decisions below fully comport with established evidentiary and other principles. The Seventh Circuit properly refused to consider an alleged remark by Dr. Smith that Petitioner should "move back to Korea." The out-of-court statement was made by Petitioner's brother-in-law and was properly held to be rank hearsay (App. 17-18). The court properly discounted alleged anti-Korean remarks by Marina Barrientos as sporadic comments by a non-decision-maker which were unrelated to Petitioner's discharge (App. 18-20). Petitioner's other "evidence" of discrimination — alleged discipline and evaluation scores of non-Koreans who were not discharged, plus her quarrel with one out of seven instances of formal discipline — was also unavailing as a matter of law. The court rightly concluded that Petitioner had failed to show any similarly situated non-Koreans who had not been discharged (App. 14). The court further noted Petitioner's complete failure to controvert six of the seven formal disciplinary notices (App. 14-16).

## CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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